

Not To Be Published:

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION**

MARGARET R. HALVERSON-
COLLINS,

Plaintiff,

vs.

COMMUNITY & FAMILY
RESOURCES,

Defendant.

No. C04-3007-MWB

**MEMORANDUM OPINION AND
ORDER REGARDING
DEFENDANT’S MOTION FOR
SUMMARY JUDGMENT**

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I. INTRODUCTION

A. Factual Background

Defendant Community & Family Resources (“CFR”) is a community based substance abuse treatment facility located in Fort Dodge, Iowa. Plaintiff Margaret R. Halverson-Collins (“Halverson-Collins”) was first hired by CFR in 1984. Halverson-Collins left CFR to work with her husband from 1987 through 1989, and was rehired by CFR in 1990. In 1990, Halverson-Collins was hired as an administrative assistant—a position which, throughout Halverson-Collins’s tenure with CFR, evolved into the position of Fiscal Manager. Despite the change in nomenclature, the job description, duties and responsibilities remained essentially the same—i.e. payroll, accounts receivable, personnel record keeping, and gathering information necessary to prepare financial reports. Halverson-Collins had no formal training in accounting or financial management, although she did attend two years of college in a biology course of study, but did not obtain a degree.

CFR operates under a Board of Directors. John Hostetler (“Hostetler”) was hired as Executive Director in 1996, and was charged with overseeing the day to day operations of CFR. Hostetler was also Halverson-Collins’s direct supervisor—as well as the direct supervisor of a number of other persons. During Hostetler’s tenure, Janeice Geitzenauer (“Janeice”) was initially hired as an administrative assistant under Halverson-Collins’s supervision.

In January 2002, the National Leadership Institute (“NLI”) conducted a technical assistance survey of CFR in terms of evaluating human resources in anticipation of a possible merger between CFR and the Center for Addictions Recovery, Inc. (“CFARI”)

in Ames, Iowa. A report authored by NLI, and dated April 30, 2002, indicates that Halverson-Collins was the Fiscal Manager of CFR and that she participated in the on-site portion of the technical assistance inquiry. Plf.'s App. at 35. One, of many, of the NLI's recommendations was:

CFR should consider hiring a full-time chief financial officer (CFO) and begin the internal reorganization of CFR infrastructure to prepare for expansion. The human resources professional standard is for one human resources employee for every 100 FTE's. CFR is operating at a deficit in this area. It currently has no human resources personnel and has the potential of having close to 50 employees.

Id. at 37.

In July 2002, CFR merged with CFARI. As a result of the merger, Hostetler took on the position of Executive Director of both agencies. Also accompanying the merger was an increase in CFR's revenue from approximately \$1.1 million in 1997 to \$3 million in 2003. Defendant's Appendix ("Deft's App."), Doc. No. 11, at 3.

In 2002, Halverson-Collins expressed to Hostetler that she felt that she had too heavy of a workload. According to Halverson-Collins, this was due to the fact that Hostetler was "taking" administrative assistant Janeice from her and using Janeice as his own administrative assistant. Deft's App. at 38. Further, Halverson-Collins avers that her need for an assistant in Janeice's absence was due to her increased responsibilities following the merger. Deft's App. at 48. Halverson-Collins also indicates that she did not request that her duties or responsibilities be reassigned, but only that she be given an assistant. Deft's App. at 38.

On September 27, 2002, Halverson-Collins filled out and submitted a time off request. On this request, Halverson-Collins checked "PTO" or paid time off leave as the type of leave requested, and indicated that she wanted November 25, 26, and 27, 2002,

off from work. Deft's Supp. App. at 33. This leave ("November 2002 leave") was granted by Hostetler. Halverson-Collins's November 2002 leave was actually due to her undergoing an ablation procedure at the Iowa Heart Center in Des Moines. Halverson-Collins contends that while she was on leave in November 2002, Hostetler took away her supervisory functions, specifically "supervising clerical, the maintenance, the cooks, and also took away payroll, and I think some ordering, purchasing." Deft's App. at 26. Halverson-Collins further claims that she was stripped of these supervisory duties due to her health. *Id.* at 26, 38. Hostetler indicated that Halverson-Collins did *not* request that her November 2002 leave be either sick leave or FMLA leave. Halverson-Collins agrees that she "probably didn't formally request [FMLA leave], because [she] didn't know that [she] had to request it." Deft's Supp. App. at 11. Further, Hostetler asserts that he had no knowledge of Halverson-Collins's reasons, medical or otherwise, for requesting this time off until her leave of absence in October 2003.

Minutes for the November 21, 2002, meeting of the CFR Financial Committee indicate that Janeice was placed in charge of accounts payable. Plf.'s App. at 40. The meeting minutes also indicate that a corrected September financial report was gone over and that Hostetler stated that Halverson-Collins and Nancy Milleson (Business Manager at CFARI) had met to insure that the information was reported correctly. *Id.* at 64.

On December 1, 2002, the Board of Directors authorized Hostetler to hire Schnurr & Company, L.L.P., to provide an overview of CFR's financial department and make recommendations for reorganization and restructuring due to the recent merger with CFARI. Deft.'s App. at 13. In preparing its report and recommendations, Schnurr & Company interviewed a number of persons playing a role in CFR's financial department. As a part of this process, Halverson-Collins was interviewed by Schnurr & Company employee Dean Barnett. *Id.* at 40. Schnurr & Company prepared a report dated April 24,

2003, which included the following pertinent findings:

Even the financial staff agrees that more information needs to be provided to users on a more timely basis. We did find indications that departments are getting more information than they give the financial department credit for but they don't recognize it—no one has explained to them what they are getting and how to read it. Overall, the fact remains that managers and department heads are not receiving the basic financial information they need on a timely basis.

* * *

Based on our inquiries it is our understanding that none of the individuals working in the financial area has any significant amount of formal training in accounting. This may contribute to the personality conflicts and territorialism because people are being challenged to perform duties for which they are not trained.

It also appears to us that various accounting functions (time reporting, patient billing, contract billing, accounts payable and payroll) are fairly segregated—they are not integrated into a singular accounting department with one supervisor who is responsible for the overall accounting function as is the case in most organizations.

Id. at 63, 64. Ultimately, Schnurr & Company recommended that CFR “hire a trained and experienced accountant with reasonable good computer skills,” and once hired that all accounting functions for both CFARI and CFR be “placed under the supervision of this accountant.” *Id.* at 65. The report also recommended that all accounting functions should be consolidated in Fort Dodge. *Id.*

The Schnurr & Company report was reviewed at the May 7, 2003, special meeting of the Board of Directors. The minutes indicate that an accountant would be hired to act

as Chief Financial Officer (“CFO”) of CFR and CFARI, consistent with Schnurr & Company’s recommendation. The minutes further state that reorganization of the financial department was discussed. Plf.’s App. at 56. On June 19, 2003, Hostetler met with Halverson-Collins to discuss the Schnurr & Company report and relayed to her that CFR would be hiring an accountant as CFO, that the financial department would be realigning responsibilities, and that downsizing of the financial department was all but inevitable. On June 23, 2003, Hostetler held a meeting with all members of the CFR finance department, including Halverson-Collins, to discuss the hiring of an accountant and the almost inevitable reorganization and downsizing of the financial department.

On August 4, 2003, at the direction of the CFR Board of Directors, Hostetler hired Lori Osterberg (“Osterberg”) as an accountant to fill the newly created CFO position. On August 18, 2003, Hostetler sent an e-mail to Osterberg, Halverson-Collins, and Nancy Milleson, among others. Hostetler states the intent of the e-mail to be a clarification of his comments at the department meeting. The e-mail states, in part:

Along with changes to whom you report, expect changes in job duties, titles, and practices. In restructuring the department duties, and practices expect a greater emphasis on integrating technology, and performance based accountability. It is possible that a complete restructuring of the department could lead to significant changes in duties and/or down sizing of the fiscal department.

Deft’s Supp. App. at 24.

In a memorandum dated August 29, 2003,¹ from Hostetler to Halverson-Collins,

¹Hostetler claims he personally went over this memorandum with Halverson-Collins on August 29, 2003. Deft’s App. at 7-8. Halverson-Collins asserts that the meeting did not take place, and she did not receive this memorandum, until October or November of (continued...)

Hostetler stated the reasons why Halverson-Collins had not received regular performance evaluations and indicated that as of August 25, 2003, she became a non-exempt employee.

In pertinent part, the memorandum states:

At this time, August 29, 2003, I still can not evaluate your performance. It is difficult for me and even the new account (sic) to understand your day to day duties. Also, with some of your duties previously transferred to Janeice, and others to the accountant, no evaluation is going to be possible until some future date. You need to work closely with the accountant so she can observe your performance on the duties you have and decide what ones you will continue and which duties will be reassigned. I have not seen the level of cooperation I would expect from you with your supervisor Lori. I also have been concerned about the lack of an acceptable quality working relationship between you and Nancy [Milleson].

Since you no longer supervise staff, you do not meet the criteria of an exempt employee. Therefore, beginning with the last payroll, we have switched you to an hourly employee. Your timesheets need to be detailed and any overtime be approved by your supervisor.

Deft.'s Supp. App. at 23. At the same time that she received this memorandum, Halverson-Collins also received her annual performance reviews for the previous two years—which were prepared by Hostetler.

An e-mail from Osterberg to Halverson-Collins on October 2, 2003, indicates that Osterberg had a discussion with Halverson-Collins on September 22, 2003, regarding Halverson-Collins's attendance at certain meetings in light of her change of status to an hourly, non-exempt employee:

¹(...continued)
2003. *Id.* at 37.

On Monday, September 22nd at about 9:00 a.m. I notified you that due to the reorganization of the Finance Staff and since you no longer supervise personnel that you would not be attending the weekly Management Staff Meetings. I explained that this was part of the transition of what I was responsible for and that I would ask you (and other Finance Staff members) for updates on information as needed.

I also discussed with you that you would also not be attending the monthly Finance and Executive Meetings or the quarterly Board Meetings. I explained that it was for the same reasons as previously discussed.

Plf.'s App. at 74.

Due to health problems involving her heart, Halverson-Collins began missing days of work in October 2003. On October 23, 2003, the Iowa Heart Center faxed CFR a note on Halverson-Collins's behalf which stated: "Please excuse Margaret from work on 15th of Oct (noon) until 30th of Oct. Due to medical necessity. Time off after this date will depend on procedure." Plf.'s App. at 70. On November 5, 2003, Hostetler wrote Halverson-Collins a letter indicating that while she never requested FMLA leave for October 15, 2003 through October 31, 2003, and that Hostetler assumed that it was related to the leave she took in October and November of 2002. Hostetler further stated that Halverson-Collins must complete and submit a Medical Certification Statement to CFR regarding the leave that she took in October 2003. On November 10, 2003, Halverson-Collins submitted a request for FMLA leave which requested both consecutive and intermittent leave from October 16, 2003, through November 5, 2003. Plf.'s App. at 72. The FMLA leave request also stated: "dr appt's Nov 13 @ 2:40 p.m. & other as needed possible surgery." *Id.* On November 11, 2003, the Iowa Heart Center faxed CFR a note which stated that Halverson-Collins "may return to work effective Nov. 5, 2003." Plf.'s

App. at 71. In a November 12, 2003, memorandum from Hostetler to Halverson-Collins, Hostetler detailed Halverson-Collins's poor communication during her FMLA leave. In particular, Hostetler states that Halverson-Collins's medical status between October 31, 2003, and November 5, 2003 remains uncertain and that "[c]onfusion abounds about your leave." Plf.'s App. at 93-94. The memorandum further states:

You did a poor job of communicating with your supervisor and your confusion about your leave status under FMLA was evidence. In the future you need to communicate better on your absences directly with your supervisor and not other employees. You need to review the FMLA policy and seek clarification.

Id. Ultimately, Halverson-Collins was given FMLA leave from October 15, 2003, through November 4, 2003; Bereavement Leave for November 5-7, 2003; Unscheduled Paid Time Off for November 10, 2003; and November 11, 2003 off for the Veteran's Day Holiday.

Id. Halverson-Collins submitted a completed certification on November 18, 2003, which indicated the probable duration of the medical condition to be from October 16, 2003, through November 5, 2003. Plf.'s App. at 90-92. Also on November 18, 2003, Halverson-Collins e-mailed Osterberg and Hostetler and stated that she would need November 26, 2003, off of work so that she could undergo a medical procedure. Plf.'s App. at 95. On November 25, 2003, the Iowa Heart Center faxed CFR a doctor's note, which stated: "pt is to be excused from work from 11/26/03—11/30/03. May return to work 12/1/03." Plf.'s App. at 73.

The minutes for the November 25, 2003, CFR Executive Committee meeting indicate that during a closed session the following motion was made, and carried:

Ralph Christiansen/Kate Owens made the motion to approve the Reorganization of the Finance Department as recommended by Senior Management Team and reviewed by

the lawyer (elimination of the Fiscal Manager and Business Manager positions effective 12/1/03 and hiring of an Executive Administrative Assistant as soon as possible. Motions carried.

Plf.'s App. at 69.

On December 1, 2003, the day Halverson-Collins returned from FMLA leave, she was approached by Hostetler and Osterberg and given a memorandum which stated, in pertinent part:

The Executive Committee of Community and Family Resources, operating under the auspices of the Board of Directors, on November 25, 2003, approved a restructuring plan for the Fiscal Department that includes staff reorganization, by duties and positions.

Regretfully, this memo is notice that your position as Fiscal Manager has been eliminated. . . .

We do have a temporary position for an Executive Administrative Assistant that may become a permanent full time position which you would be eligible to apply for. The internal announcement of the position has expired; however, if you let me know of your interest by 4:30 p.m. on Tuesday December 2, 2003, I will be glad to arrange a time for you to complete the testing requirements with Manpower for the position. I have enclosed a job description with this memo.

Deft's App. at 70. Halverson-Collins never expressed interest in the Executive Assistant position, therefore December 1, 2003, was her last day with CFR. On December 1, 2003, three other individuals were also terminated: Nancy Milleson—the Business Manager at CFARI; Robert Thacker—Associate Director; and Susan Busch—Developmental Director. Deft's App. at 9. Janeice was eventually hired to fill the Executive Assistant position—even though she did not possess the bachelor's degree the job position

description stated was desired. *Id.* at 73.

On December 17, 2003, CFR ran an “Accounting Technician” job announcement in the Fort Dodge, Iowa, newspaper. The announcement stated:

Immediate opening for a full-time Accounting Technician. Duties will include processing and input of both payroll and accounts payable, expense report processing, petty cash and completing reports as required. Prior experience with payroll and accounts payable preferred. A 2- year degree in Accounting and/or 3-5 years of experience are required. Must be proficient in MS Excel and Word. Critical to this position is being able to work in a fast-paced environment, accuracy, excellent organizational skills and attention to detail.

Plf.’s App. at 104. The announcement lists Osterberg as the contact person. *Id.*

B. Procedural Background

On January 22, 2004, Halverson-Collins filed a Complaint and Jury Demand against CFR resulting from her termination on December 1, 2003. (Doc. No. 1). Halverson-Collins’s Complaint alleges a single cause of action: violation of the Family and Medical Leave Act, 29 U.S.C. § 2061, *et seq.* (“FMLA”) grounded in retaliation. On February 24, 2004, CFR filed an answer with this court denying the substance of Halverson-Collins’s claim. (Doc. No. 3). On December 24, 2004, CFR filed a Motion for Summary Judgment. (Doc. No. 11). Halverson-Collins filed a timely resistance to CFR’s motion on January 18, 2005. (Doc. No. 13). CFR filed its reply on January 24, 2005. (Doc. No. 15). Though Halverson-Collins requested oral argument on this motion in her resistance, after reviewing the legal issues presented, as well as the record, the court finds no need to entertain oral argument in order to rule on CFR’s motion for summary judgment. A jury trial in this matter is currently scheduled for May 9, 2005. The matter is now fully

submitted and ready for a determination by this court.

II. LEGAL ANALYSIS

A. Standards For Summary Judgment

Summary judgment is appropriate when the court after viewing all of the facts, and inferences drawn from those facts, in the light most favorable to the non-moving party, and giving that party the benefit of all reasonable inferences that can be drawn from the facts, concludes there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *See Dropinski v. Douglas County, Neb.*, 298 F.3d 704, 706 (8th Cir. 2002); *P.H. v. Sch. Dist. of Kansas City, Mo.*, 265 F.3d 653, 658 (8th Cir. 2001) (nonmoving party, “is entitled to all reasonable inferences-those that can be drawn from the evidence without resort to speculation.”) (quoting *Sprenger v. Fed. Home Loan Bank of Des Moines*, 253 F.3d 1106, 1110 (8th Cir. 2001) (internal quotations omitted); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). The court’s function at the summary judgment stage of the proceedings is not to “to weigh evidence in the summary judgment record to determine the truth of any factual issue; we merely determine whether there is evidence creating a genuine issue for trial.” *Bell v. Conopco, Inc.*, 186 F.3d 1099, 1101 (8th Cir. 1999) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-51, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)).

According to Rule 56(e), once the moving party files a properly supported motion for summary judgment, the burden shifts to the nonmoving party to point out genuine issues of material fact that would preclude judgment as a matter of law for the moving party. *See* FED. R. CIV. P. 56(e); *Bennett v. Dr Pepper/Seven Up, Inc.*, 295 F.3d 805, 808-09 (8th Cir. 2002); *Naucke v. City of Park Hills*, 284 F.3d 923, 927 (8th Cir. 2002)

(explaining, “a nonmovant must present more than a scintilla of evidence and must advance specific facts to create a genuine issue of material fact for trial.”) (citing *F.D.I.C. v. Bell*, 106 F.3d 258, 263 (8th Cir. 1997), quoting *Rolscreen Co. v. Pella Prods. of St. Louis, Inc.*, 64 F.3d 1202, 1211 (8th Cir. 1995)); *Bailey v. U.S. Postal Serv.*, 208 F.3d 652, 654 (8th Cir. 2000) (nonmoving party “may not rest upon ‘mere allegations or denials’ contained in its pleadings, but must, by sworn affidavits and other evidence, ‘set forth specific facts showing that there is a genuine issue for trial.’”) (quoting FED. R. CIV. P. 56(e)); *Mathews v. Trilogy Communications, Inc.*, 143 F.3d 1160, 1164 (8th Cir. 1998) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Moreover, the party opposing summary judgment “must make a sufficient showing on every essential element of its claim on which it bears the burden of proof.” *P.H.*, 265 F.3d at 658 (quoting *Buettner v. Arch Coal Sales Co.*, 216 F.3d 707, 718 (8th Cir. 2000), *cert. denied*, 531 U.S. 1077, 121 S. Ct. 773, 148 L. Ed. 2d 672 (2001). The consequence of a nonmoving party’s failure of proof concerning an essential element of the case “renders all other facts immaterial,” and in such a case, no genuine issue of fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The court looks to the substantive law to determine if an element is ‘essential’ to the underlying case. *Id.* Therefore, the movant is entitled to summary judgment where the factual dispute does not affect the outcome of the case under the governing law. See *Jackson v. Arkansas Dept. of Educ., Vocational & Tech. Educ. Div.*, 272 F.3d 1020, 1025 (8th Cir. 2001), *cert. denied*, 536 U.S. 908, 122 S. Ct. 2366, 153 L. Ed. 2d 186 (2002) (citing *Anderson*, 477 U.S. at 248, 106 S. Ct. 2505).

The Eighth Circuit Court of Appeals has cautioned that “summary judgment should seldom be used in employment discrimination cases.” See *Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994). This exceptional deference shown the nonmoving party is

warranted, according to the Eighth Circuit Court of Appeals, “Because discrimination cases often turn on inferences rather than on direct evidence . . .” *E.E.O.C. v. Woodbridge Corp.*, 263 F.3d 812, 814 (8th Cir. 2001) (en banc) (citing *Crawford*, 37 F.3d at 1341; *Conopco, Inc.*, 186 F.3d at 1101 (citing *Snow v. Ridgeview Med. Ctr.*, 128 F.3d 1201, 1205 (8th Cir. 1997), and because “intent” is generally a central issue in employment discrimination cases. *Christopher v. Adam’s Mark Hotels*, 137 F.3d 1069, 1071 (8th Cir. 1998) (citing *Gill v. Reorganized Sch. Dist. R-6, Festus, Mo.*, 32 F.3d 376, 378 (8th Cir. 1994)). Nonetheless, this exercise of judicial prudence “cannot and should not be construed to exempt” from summary judgment, employment discrimination cases involving intent. *Christopher*, 137 F.3d at 1071 (quoting *Krenik v. County of Le Sueur*, 47 F.3d 953, 959 (8th Cir. 1995)). The fact remains that “the ultimate burden of persuading the trier of fact that the defendants intentionally discriminated against the plaintiff remains at all times with the plaintiff.” *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000). Furthermore, “where the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate.” *Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311, 1315 (8th Cir. 1996) (quoting *Crain v. Board of Police Comm’rs*, 920 F.2d 1402, 1405-06 (8th Cir. 1990)). With these principles in mind, the court will now turn to the substance of CFR’s motion for summary judgment.

B. Family Medical Leave Act Claim

The FMLA provides for up to twelve workweeks per year of medical leave to covered employees under various circumstances and prohibits employers from discriminating against employees for exercising their rights under the FMLA. *See* 29 U.S.C. §§ 2612, 2615(a)(2). The FMLA also protects against retaliation for exercising

FMLA rights—specifically stating that it is “unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.” *Id.* § 2615(a); *See Smith v. Allen Health Systems, Inc.*, 302 F.3d 827, 832 (8th Cir. 2002) (“Basing an adverse employment action on an employee’s use of leave, or in other words, retaliation for exercise of [FMLA] rights, is . . . actionable.”). In this instance Halverson-Collins lodges a claim of retaliation—claiming that CFR terminated her because she exercised her rights under the FMLA.

1. *Analytical framework of FMLA retaliation claims*

In their briefs, there is some disagreement between the parties as to the appropriate standards to apply in analyzing an FMLA retaliation claim—particularly in terms of the respective burdens of proof at the summary judgment stage. Therefore, before setting forth the analytical framework and respective burdens of proof, the court will first summarize the arguments of the parties in this regard.

a. *Arguments of the parties*

In its motion for summary judgment, CFR utilizes the traditional *McDonnell Douglas* burden-shifting analysis to analyze the plaintiff’s FMLA retaliation claim. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). After conceding that the record establishes a genuine issue of material fact as to Halverson-Collins’s *prima facie* case of FMLA retaliation, CFR argues that it has offered a legitimate, non-discriminatory reason for Halverson-Collins’s termination that rebuts the plaintiff’s *prima facie* case, and further that Halverson-Collins cannot establish a genuine issue of material fact that this stated reason is pretextual—thereby, justifying summary judgment in CFR’s favor.

In resistance, Halverson-Collins states that in general the burden of proof at summary judgment always remains on the defendant and that the plaintiff’s burden of proof

is not higher than it would be at trial. Particularly, Halverson-Collins takes issue with CFR's position that if it can come forth with a legitimate, non-discriminatory reason for discharging her, then she must come forth with proof that this reason is pretextual. Halverson-Collins indicates that following the Supreme Court's decision in *Desert Palace v. Costa*, 539 U.S. 90, 123 S. Ct. 2148, 156 L. Ed. 2d 84 (2003), there is no burden on her to present direct evidence of retaliation, and that "[i]t is clear from *Desert Palace* that Congress intended to hold employers liable when discrimination was a contributing factor in the employment action even if other motives exist." Plaintiff's Brief in Resistance to Defendant's Motion for Summary Judgment ("Plf.'s Brief"), Doc. No. 13, at 21. Halverson-Collins also seemingly argues that *Desert Palace* abrogated the *McDonnell Douglas* burden-shifting analysis, but concedes that this is not the law of the circuit post-*Griffith v. City of Des Moines*, 387 F.3d 733 (8th Cir. 2004). Halverson-Collins additionally claims that the FMLA does not require a plaintiff to prove pretext in order to establish liability—therefore, she should not bear the burden of proving pretext at the summary judgment stage. Finally, Halverson-Collins recognizes that though she argues that the *McDonnell Douglas* burden-shifting analysis should not be applied to her FMLA retaliation claim as there are no pretext requirements in the FMLA, her position does appear to run counter to controlling Eighth Circuit precedent. Resistance, Doc. No. 13, at 31 n.19.

In reply, CFR merely states that this court, as well as every other court cited in its brief, have analyzed FMLA retaliation claims using the *McDonnell Douglas* burden-shifting approach, and that Halverson-Collins misunderstands, and misapplies, the applicable approach for FMLA retaliation claims in her resistance.

b. Resolution of disagreement

In *Griffith*, the Eighth Circuit Court of Appeals examined the impact of *Desert Palace* on the *McDonnell Douglas* framework at the summary judgment stage of an employment discrimination lawsuit:

“Proof that the defendant’s explanation is unworthy of credence [i.e., pretextual] is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive.” *Reeves*, 530 U.S. at 147, 120 S. Ct. 2097.

We have long recognized and followed this principle in applying *McDonnell Douglas* by holding that a plaintiff may survive the defendant’s motion for summary judgment in one of two ways. The first is by proof of “direct evidence” of discrimination. Direct evidence in this context is not the converse of circumstantial evidence, as many seem to assume. Rather, direct evidence is evidence “showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated” the adverse employment action. *Thomas v. First Nat’l Bank of Wynne*, 111 F.3d 64, 66 (8th Cir. 1997). Thus, “direct” refers to the causal strength of the proof, not whether it is “circumstantial” evidence. A plaintiff with strong (direct) evidence that illegal discrimination motivated the employer’s adverse action does not need the three-part *McDonnell Douglas* analysis to get to the jury, regardless of whether his strong evidence is circumstantial. But if the plaintiff lacks evidence that clearly points to the presence of an illegal motive, he must avoid summary judgment by creating the requisite inference of unlawful discrimination through the *McDonnell Douglas* analysis, including sufficient evidence of pretext. *See, e.g., Harvey v. Anheuser-Busch, Inc.*, 38 F.3d 968, 971 (8th Cir. 1994). This formation is entirely consistent with *Desert*

Palace. Thus, we conclude that *Desert Palace* had *no* impact on prior Eighth Circuit summary judgment decisions.

Griffith, 387 F.3d at 736 (footnote omitted). In *Torlowei v. Target*, ___ F.3d ___, 2005 WL 678504 (8th Cir. Mar. 25, 2005), the Eighth Circuit Court of Appeals, in a per curiam decision, reiterated its position in *Griffith*:

After the district court’s opinion in this case was issued, this court, in *Griffith v. City of Des Moines*, 387 F.3d 733, 735-36 (8th Cir. 2004), held that “*Desert Palace* had *no* impact on prior Eighth Circuit summary judgment decisions.” *Id.* at 736. We stressed that *Desert Palace* is applicable to post-trial jury instructions, and not to the analysis performed at summary judgment. And we concluded that any language in *Desert Palace* that may seem to point to a chance in the *McDonnell Douglas* framework refers only to the traditional understanding that direct evidence—evidence, circumstantial or otherwise, that shows a strong causal connection between discriminatory animus and the adverse employment action—is another method of defeating a defendant’s summary judgment motion. *Id.* The district court’s recitation of the law would have been complete without reference to *Desert Palace* in this summary judgment case.

Id. at *1. The continued livelihood of the *McDonnell-Douglas* framework is also evidenced by the Eighth Circuit’s continued application of the *McDonnell-Douglas* analysis in Title VII retaliation claims post-*Griffith*. See *Eliserio v. United Steelworkers of Am. Local 310*, 398 F.3d 1071, 1078 (8th Cir. 2005) (“To analyze a claim of retaliation under Title VII we apply the *McDonnell Douglas* three-part burden shifting analysis.”); *Kratzer v. Rockwell Collins, Inc.*, 398 F.3d 1040, 1048 (8th Cir. 2005) (“The *McDonnell Douglas* framework governs the order and allocation of proof for retaliation claims.”); *Hesse v. Avis Rent-A-Car Sys., Inc.*, 394 F.3d 624, 632 (8th Cir. 2005) (“The *McDonnell Douglas* analysis also applies to claims of retaliation.”); accord *Strate v. Midwest*

Bankcentre, Inc., 398 F.3d 1011, 1016 (8th Cir. 2005) (“the district court *correctly noted* that the Eighth Circuit, in the aftermath of *Desert Palace*, has continued to apply the burden-shifting framework established in *McDonnell Douglas* to determine whether or not a claim of unlawful employment discrimination can survive a defendant’s motion for summary judgment.”). This is particularly telling in light of the fact that the *McDonnell Douglas* burden-shifting framework utilized in Title VII retaliation claims has been applied to FMLA retaliation claims by the Eighth Circuit Court of Appeals, as well as district courts. *See McBurney v. Stew Hansen’s Dodge City, Inc.*, 398 F.3d 998, 1002 (8th Cir. 2005) (utilizing *McDonnell Douglas* framework to analyze plaintiff’s FMLA retaliation claim); *Smith v. Allen Health Systems, Inc.*, 302 F.3d 827, 832-35 (8th Cir. 2002) (analyzing plaintiff’s FMLA retaliation claim under *McDonnell Douglas* framework following district court’s grant of summary judgment in favor of employer); *Darby v. Bratch*, 287 F.3d 673 (8th Cir. 2002) (listing *prima facie* case elements similar to those employed in analyzing Title VII retaliation claims); *Jennings v. Mid-American Energy Comp.*, 282 F. Supp. 2d 954 (S.D. Iowa 2003) (noting, in analyzing plaintiff’s FMLA retaliation claim, that *McDonnell Douglas* burden-shifting analysis applies “[i]n the absence of direct evidence that the employer’s actions were motivated by an impermissible retaliatory or discriminatory animus”) (citation and internal quotation omitted); *Gonzalez v. City of Minneapolis*, 267 F. Supp. 2d 1004, 1010 (D. Minn. 2003) (“FMLA retaliation claims are subject to the same analysis as claims under Title VII.”); *Longstreth v. Copple*, 1999 WL 33326724 at *6 (N.D. Iowa May 6, 1999) (noting application of *McDonnell Douglas* framework to FMLA retaliation claims, and applying the burden-shifting analysis to the plaintiff’s claim). The Eighth Circuit Court of Appeals has also recognized that a plaintiff “can prove FMLA retaliation circumstantially, using a variant of the burden shifting test established in *McDonnell Douglas*” *McBurney*, 398 F.3d at 1002; *see*

Smith, 302 F.3d at 832 (“An employee can prove [FMLA] retaliation circumstantially, using a variant of the *McDonnell Douglas* method of proof.”) (footnote omitted). Therefore, the traditional *McDonnell Douglas* framework is the appropriate analytical vehicle by which to analyze Halverson-Collins’s FMLA retaliation claim.

c. Analytical framework

Under the *McDonnell Douglas* burden-shifting framework, the plaintiff carries the initial burden of coming forward with sufficient evidence to establish a *prima facie* case of retaliation. *McDonnell Douglas*, 411 U.S. at 802. In this instance, the elements of Halverson-Collins’s *prima facie* case are: (1) she engaged in protected activity under the FMLA; (2) her employer subsequently took adverse employment action against her; and (3) the adverse action was causally linked to her protected activity. *McBurney*, 398 F.3d at 1002 (setting forth elements of *prima facie* case of FMLA retaliation); *Darby*, 287 F.3d at 679 (same); *Smith*, 302 F.3d at 832 (same); *Regan v. Natural Resources Group, Inc.*, 345 F. Supp. 2d 1000, 1010 (D. Minn. 2004) (same); *Longstreth*, 1999 WL 33326724 at *7 (same). If the plaintiff meets her initial burden of establishing a *prima facie* case, then the burden shifts to the employer “to articulate some legitimate, nondiscriminatory reason for the employee’s [termination].” *McDonnell Douglas*, 411 U.S. at 802. If the employer meets this burden of production, the legal presumption that would justify a judgment as a matter of law based on the plaintiff’s *prima facie* case dissolves, *Id.* at 804, and “the burden shifts again to the [p]laintiff to prove, by a preponderance of the evidence, that [the employer’s] proffered explanation is merely a pretext for discrimination.” *Jennings*, 282 F. Supp. 2d at 962 (citing *Smith*, 302 F.3d at 833). “An employee’s attempt to prove pretext . . . requires more substantial evidence [than it takes to make a *prima facie* case], however, because unlike evidence establishing the *prima facie* case, evidence of pretext . . . is viewed in the light of the employer’s justification.” *Smith*, 302 F.3d at 834

(quoting *Sprenger v. Federal Home Loan Bank of Des Moines*, 253 F.3d 1106, 1111 (8th Cir. 2001)). In employing the *McDonnell Douglas* framework, the court keeps in mind that the focus of the inquiry at summary judgment is always whether the evidence is sufficient to generate a genuine issue of material fact that the employer discriminated against the plaintiff because of a protected characteristic or activity. See *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328, 1336-37 (8th Cir. 1996).

2. Arguments of the parties

a. CFR's argument for summary judgment

In its motion for summary judgment, CFR first argues that it has articulated a legitimate non-discriminatory reason for Halverson-Collins's termination—specifically, that Halverson-Collins was discharged as part of a well-documented reorganization of the financial department at CFR. CFR points to the fact that CFARI Business Manager Milleson, who had not recently taken FMLA leave, was also terminated on December 1, 2003, as part of the reorganization as establishing that Halverson-Collins would have been terminated on December 1, 2003, regardless of whether she was on FMLA leave. CFR then contends that as it has articulated a legitimate, non-discriminatory reason for the adverse employment action, the presumption created by the *prima facie* case is destroyed and the burden shifts to Halverson-Collins to generate a genuine issue of material fact that the proffered legitimate reason is pretext. This is a burden which CFR asserts Halverson-Collins cannot meet—in support of this contention CFR states the following facts: (1) Halverson-Collins admitted that CFR granted her all of the medical leave she or her doctors requested under the FMLA; (2) Halverson-Collins admitted she was challenged in her position as Fiscal Manager; (3) Halverson-Collins testified that she had met with Hostetler to discuss her skill level for her position—in particular, her lack of computer knowledge or accounting background (4) Halverson-Collins admitted that it was a good

decision to hire Osterberg to oversee the accounting department; (5) Halverson-Collins testified that it was always CFR's intent to consolidate the accounting functions at CFR and CFARI; and (6) CFR's invitation to Halverson-Collins to apply for the Executive Administrative assistant position is inconsistent with retaliatory intent. CFR also contends, despite Halverson-Collins's testimony to the contrary, that Hostetler met with her on a number of occasions to discuss her lack of computer proficiency as well as the fact that department heads were not getting the financial information they needed from her in a timely, or legible, fashion—thus, Halverson-Collins's ability to perform fiscal or accounting positions was seriously doubted. In light of the foregoing, CFR contends that Halverson-Collins is left with only the proximity of her termination to her return from FMLA leave to raise a genuine issue of material fact as to pretext—and this alone is insufficient to meet her burden.

b. Halverson-Collins's argument in resistance

In resistance, Halverson-Collins claims that a timeline of events is necessary to understand how a genuine issue of material fact can be generated as to pretext. According to Halverson-Collins, the events proceeded as follows:

- At the time of the merger in July 2002, CFR took over all financial responsibility from CFARI—thus, all financial aspects of both agencies became Halverson-Collins's responsibility as Fiscal Manager.
- In November 2002, Halverson-Collins began having problems with her heart, and due to her health problems requested an assistant. Janeice was technically her assistant at the time, but Hostetler had usurped Janeice as his own assistant. Rather than giving her an assistant, Hostetler stripped her of all her supervisory duties while she was on leave.
- On June 19, 2003, Hostetler met with Halverson-Collins to discuss the

reorganization and hiring of an accountant. It was discussed that the reorganization would terminate the financial department at CFARI and bring all financial responsibilities to CFR. It would also require Nancy Milleson's discharge. While there was discussion of realigning Halverson-Collins's duties, there was no discussion of her termination.

- On June 23, 2003, there was a staff meeting to inform the financial department of the hiring of an accountant.
- Osterberg was hired as the CFO on August 5, 2003.
- By August 25, 2003, Halverson-Collins was stripped of all her duties as Fiscal Manager except tracking receivables, and was stripped of her salaried/exempt status and became an hourly employee.
- The reorganization of the finance department was confirmed in a memo to Halverson-Collins on October 2, 2003. Therefore, when the CFR Executive Committee approved plans to reorganize the finance department on November 25, 2003, they were only approving what had already taken place.
- The Executive Administrative Assistant position CFR offered to Halverson-Collins on December 1, 2003, was already filled by Janeice at that time.
- Halverson-Collins's position was renamed as "Accounting Technician" and advertised as open following her discharge.

Resistance at 16-19.

The plaintiff contends that when viewed in light of this timeline of events, the record generates genuine issues of material fact as to whether the defendant's proffered legitimate, nondiscriminatory reason is pretextual. Halverson-Collins contends that no reorganization took place following August 25, 2003—the date that Halverson-Collins was stripped of the duties and responsibilities accompanying her "Fiscal Manager" title and

was reduced to an hourly employee. Further, the October 2, 2003, memorandum from Osterberg indicated that based on the completed reorganization, Halverson-Collins would no longer attend management staff meetings. Halverson-Collins also contends that her remaining duties, which were mostly clerical, were consistent with those outlined in the “Accounting Technician” position advertised immediately following her termination.

Halverson-Collins also disagrees with CFR’s representation that a financial downturn in 2003 forced the reorganization of the finance department. Halverson-Collins contends that the following contributed to CFR’s cash flow problems: (1) when she was stripped of purchasing authority in 2002, purchasing no longer had any budget control; (2) purchase of an unbudgeted computer server; and (3) grants were not funded as expected. However, these cash flow problems were CFR induced—not a true economic downturn.

With regard to her job performance, Halverson-Collins contends that prior to November 2002, when she first took leave to attend to her medical needs, there was no criticism of her job performance. Halverson-Collins takes issue with CFR’s assertion that she was deficient in using a computer in general, or in operating accounting based software. Halverson-Collins contends she was proficient at using CFR’s accounting software, and although Janeice was not even trained to use the software, Halverson-Collins’s accounting responsibilities were handed over to Janeice in November 2002. Halverson-Collins asserts that she was always able to prepare financial reports on CFR’s accounting software, and that any complaints about her financial reports almost always arose for one of the following reasons: (1) department heads did not understand how to read the financial reports; and/or (2) department heads reported incorrect information to her. Further, Halverson-Collins states that performance evaluations were not regularly conducted by Hostetler, that there was no issue with her performance until the reorganization was complete in August 2003, and Hostetler wanted to get rid of her.

As to the newly created Executive Administrative Assistant position that CFR indicated she could apply for on the day of her termination, Halverson-Collins contends that Janeice already held that position and that it would have been futile for Halverson-Collins to have applied for it. Finally, Halverson-Collins asserts that Business Manager Milleson at CFARI was *not* her counterpart—specifically because with the merger in June 2002 her position as Fiscal Manager nearly doubled in terms of workload as the fiscal department at CFARI was transferred to CFR, while Milleson’s duties dwindled to nearly nothing. Thus, Halverson-Collins argues, Milleson’s position *needed* to be eliminated, and should have been eliminated before December 1, 2003.

In summary, Halverson-Collins asserts that CFR has not come forth with a legitimate, nondiscriminatory reason for firing her as all reorganization of the finance department was completed months before she was terminated, and alternatively that the record generates a genuine issue of material fact as to whether the proffered reason is pretextual.

c. CFR’s reply

In reply, CFR first contends the Halverson-Collins’s version of the facts and timeline of events is wrought with inconsistencies and is unsupported in the record. Further, CFR asserts that its concession that Halverson-Collins has established a *prima facie* case does not justify denial of the summary judgment motion—as in so conceding CFR merely recognizes that the *prima facie* burden is easy to meet and that the close temporal proximity between Halverson-Collins’s protected leave and termination of her employment is sufficient to satisfy the causation element. However, CFR notes that the analysis does not end with the satisfaction of establishing a *prima facie* case. CFR compares this case to that addressed by this court in *Longstreth v. Copple*, 1999 WL 33326724 (N.D. Iowa May 6, 1999)—in which this court held that comments by the

plaintiff's supervisor combined with temporal proximity constituted sufficient circumstantial evidence to defeat the defendant's motion for summary judgment. CFR contends that unlike *Longstreth*, there are no such comments on admissions by CFR or any of Halverson-Collins's supervisors.

Further, Halverson-Collins admitted that she did not give the Executive Administrative Assistant position any consideration because it required a college degree, which Hostetler knew she did not have—however, CFR argues that there is *no evidence*, outside Halverson-Collins's unsupported assertions, that the offer was not made in good faith. CFR additionally asserts that though all of her supervisory duties had been stripped from her as of August 2003, Halverson-Collins continued to be paid at the Fiscal Manager rate, and that she was allowed to stay on until December 2003 only to allow Osterberg to acclimate to her new role as CFO.

Finally, CFR contends that Halverson-Collins's resistance relies on a critical misstatement of fact—that Halverson-Collins took FMLA leave in November 2002. CFR asserts that the record conclusively establishes that Halverson-Collins requested *only* Paid Time Off leave, and that she did not disclose the reasons for this leave to anyone at CFR. Therefore, Halverson-Collins's attempt to create a presumption that the department reorganization was causally connected to her work absence in November 2002 is completely unsupported by the record.

In sum, CFR asserts that, even in the light most favorable to Halverson-Collins, the record points to *only one* conclusion: Halverson-Collins was terminated as Fiscal Manager on December 1, 2003, as the final step in CFR's reorganization of the financial department following the merger, and *not* in retaliation for her taking FMLA leave.

3. *Analysis*

In this instance, CFR concedes that, for purposes of summary judgment, Halverson-Collins has succeeded in establishing her *prima facie* case. Therefore, the only issues remaining are whether CFR has articulated a legitimate, nondiscriminatory reason for terminating Halverson-Collins on December 1, 2003; and, if so, has Halverson-Collins presented evidence that “creates questions of fact as to whether [CFR’s] proffered reason [i]s pretextual and . . . creates a reasonable inference that [CFR] acted in retaliation.” *Smith*, 302 F.3d at 833.

CFR contends that Halverson-Collins was terminated as the final step in the restructuring and reorganization of CFR’s financial department following its merger with CFARI, and due to the financial downturn CFR experienced in 2003. CFR has come forward with evidence that indicates that Halverson-Collins’s position was eliminated as part of the reorganization of the financial department—specifically, the NLI and Schnurr & Company reports, as well as meeting minutes from the Board of Directors and Executive Committee concerning the reorganization. This satisfies CFR’s burden of articulating a legitimate, nondiscriminatory reason for Halverson-Collins’s termination. *See Groves v. Cost Planning and Management Intern., Inc.*, 372 F.3d 1008, 1010 (8th Cir. 2004) (finding that employer’s consideration of “productivity, project load, flexibility and seniority” in deciding which employees would be eliminated in reduction in force met employer’s burden of coming forward with a legitimate, nondiscriminatory reason); *Heath v. Heartland Health Sys., Inc.*, 242 F.3d 375 (Table), 2000 WL 1820639 at *1 (8th Cir. Dec. 13, 2000) (finding adoption of management reorganization and cut-back plan driven by need to cut costs after a merger to be a legitimate, non-discriminatory reason in age discrimination case); *Hayes v. U.S. Bancorp Piper Jaffray, Inc.*, 2004 WL 2075560 at *12 (D. Minn. Sept. 16, 2004) (holding employer had “unquestionably” satisfied its burden

in coming forward with a legitimate, nondiscriminatory reason where employer contended that plaintiff was laid off “for business reasons unrelated to her leave, and that after considering her performance and potential, and faced with a compelled reduction-in-force, her termination would not pose a comparatively significant loss to [the employer].”); *Reach v. AlliedSignal, Inc.*, 184 F. Supp. 2d 932, 944 (W.D. Mo. 2000) (finding reduction in force that eliminated forty-three positions, including plaintiff’s, to be a legitimate, nondiscriminatory reason); *Longstreth*, 1999 WL 33326724 at *8 (holding elimination as the result of a company wide reduction in force satisfied employer’s burden to come forward with a legitimate, nondiscriminatory reason). As CFR has met its burden of articulating a legitimate, nondiscriminatory reason for terminating Halverson-Collins, under the *McDonnell Douglas* framework the presumption created by the *prima facie* case dissolves, and the burden shifts back to Halverson-Collins to generate a genuine issue of material fact that the reason articulated is pretext.

To sustain her burden, Halverson-Collins must produce “some additional evidence beyond the elements of the *prima facie* case” that would allow a rational jury to reject CFR’s proffered reasons as pretext for discrimination. *Krenik v. County of Le Sueur*, 47 F.3d 953, 959 (8th Cir. 1995). It is clear that temporal proximity of the FMLA leave and the adverse employment action cannot, standing alone, sustain Halverson-Collins’s burden. *See Groves*, 372 F.3d at 1010 (“timing alone does not sufficiently undermine [the employer’s] justifications to create a genuine issue of fact on pretext”); *Smith*, 302 F.3d at 834 (finding that “the sole fact that [the plaintiff] was fired at about the same time she took family leave cannot support an inference of pretext.”); *Sprenger*, 253 F.3d at 1114 (8th Cir. 2001) (“we have been hesitant to find pretext or discrimination on temporal proximity alone, and look for proximity in conjunction with other evidence.”) (citations omitted); *Bell v. Runyon*, 242 F.3d 373 (Table), 2000 WL 1705063 at *1 (8th Cir. Nov.

15, 2000) (affirming grant of summary judgment where plaintiff failed to establish a genuine issue of material fact as to whether employer's proffered legitimate, non discriminatory reasons were pretextual and where temporal proximity was the *only* evidence of a causal connection between protected activity and adverse employment decision); *Caudill v. Farmland Indus., Inc.*, 919 F.2d 83, 86-87 (8th Cir. 1990) (holding that close temporal proximity between filing of age discrimination charges and firing of plaintiff constituted a "slender reed of evidence" for which "rank speculation" would be required to assume causal connection between the two events, in light of other evidence presented); *Armstrong v. Systems Unlimited, Inc.*, 2002 WL 31995357 at *8 (N.D. Iowa Nov. 25, 2002) ("The sole fact that the plaintiff was demoted at around the same time as her FMLA leave cannot support an inference of pretext."), *aff'd* 2003 WL 22077483 (8th Cir. 2003). However, temporal proximity in conjunction with other circumstantial evidence supporting an inference of pretext *can* satisfy the plaintiff's burden on summary judgment. *See Strate v. Midwest Bankcentre, Inc.*, 398 F.3d 1011, 1020-21 (8th Cir. 2005) (finding plaintiff had satisfied her burden regarding pretext from combination of close temporal proximity, strong employment history, and where plaintiff was objectively qualified for newly created position but was told she was a non-viable candidate); *Longstreth*, 1999 WL 33326724 at *11-12 (finding plaintiff had satisfied her burden of raising genuine issues of material fact regarding pretext from combination of close temporal proximity, supervisor's comments to plaintiff upon her termination and allegations in plaintiff's affidavit). The court will now examine the record for any additional circumstantial evidence supporting an inference of pretext.

It is undisputed that in November 2002, Halverson-Collins took leave, and that in requesting this leave she indicated that she was taking Paid Time Off Leave, and not Sick Leave or FMLA leave. Halverson-Collins contends that during this leave she was stripped

of all of her supervisory duties due to her health. Deft's App. at 26. Hostetler has routinely denied even knowing that Halverson-Collins's November 2002 leave was medically related, and that "it was not until her leave of absence in October, 2003, that [he] learned of the connection between her leave in 2002 and her leave in October 2003." Deft's Supp. App. at 3. However, Hostetler's statements are inconsistent with his November 5, 2003, letter to Halverson-Collins, in which he wrote:

You have not requested Family and Medical Leave per CFR Policy, *however, I believe the condition upon which your physician references as requiring leave based upon Medical Necessity is the same as what occurred medically which resulted in your loss of work October 3, 4, 5, 10, 11, and November 20, 21 and 22 of 2002.* At that time, no request for FMLA was presented by you or (sic) CFR.

Plf.'s App. at 88 (emphasis added). In the November 5, 2003, letter Hostetler notes that he believes that the *same medical condition* precipitated both her October and November 2002 leave as her October and November 2003 leave. Nothing in the doctor's notes in the record would enlighten Hostetler as to the connection between the two leave periods—therefore, issues of fact certainly exist as to Hostetler's knowledge of the circumstances surrounding Halverson-Collins's 2002 leave, especially in light of the fact that Halverson-Collins avers she was divested of certain supervisory authority and job responsibilities during that leave. Plf.'s App. at 83-84.

In the brief in support of her resistance, Halverson-Collins indicates that Janeice already was performing the job functions of the Executive Administrative Assistant position, and had been since Hostetler had taken Janeice out from under Halverson-Collins's supervision in November 2002. Therefore, it would have been futile for her to apply for this newly created position. Further, Halverson-Collins contends that the job description was obviously written to disqualify her from consideration as it required a

bachelor's degree. While Halverson-Collins lodges a compelling argument, unfortunately, she does not make any reference to the record in support of her assertions—nor can the court find any such reference. In her deposition, Halverson-Collins does state that she did not give any serious consideration to applying for the Executive Administrative Assistant position. Deft's App. at 53. There is nothing in her deposition testimony, or her affidavit, that suggests that Halverson-Collins failed to show any interest in the position for the reasons asserted in her brief. Further, CFR hired Janeice, who does not have a college degree, to fill the Executive Administrative Assistant position—which, in light of a lack of record evidence supporting her argument, is a drastic blow to Halverson-Collins's assertion that the position description was written so as to dissuade her from applying. As this argument is without support in the record, it cannot be considered in determining if Halverson-Collins has met her burden of showing a genuine issue of material fact as to pretext.

However, a key piece of circumstantial evidence remains—the “Accounting Technician” job announcement placed in the Fort Dodge newspaper only sixteen days after Halverson-Collins's termination (and likely posted at CFR earlier than that). The announcement indicates the position requires “[a] 2-year degree in Accounting *and/or* 3-5 years of experience.” Plf.'s App. at 103 & 104 (emphasis added). Halverson-Collins, while not possessing a degree, certainly had the requisite experience as she had been employed at CFR in a fiscal capacity from 1990 through August 2003. Halverson-Collins also had the preferred qualification of “[p]rior experience with payroll and accounts payable.” *Id.* Now, there is *significant* disagreement among the parties regarding Halverson-Collins's computer proficiency and preparation of financial reports—both of which are duties listed for the “Accounting Technician” position. Hostetler contends that he met with Halverson-Collins *numerous* times to discuss her deficiency in operating

computer programs, her sloppy and unorganized financial reports, the complaints lodged against her by department heads, and her untimely reporting of financial data. Deft's Supp. App. at 2. Two members of the CFR Board of Directors also stated in their affidavits that there was a concern about Halverson-Collins's computer proficiency and the timeliness of financial data preparation. Deft's App. at 13,16. Halverson-Collins, on the other hand, avers that "at no time ha[d] Mr. Hostetler been critical of [her] use of word processing software," Plf.'s App. at 84, and further testified:

Q: Wasn't your computer skills a source of ongoing concern?

A: I don't know that.

Q: Wasn't that expressed to you on more than one occasion by Mr. Hostetler, that your lack of good computer skills was a concern at CFR?

A: No.

Q: Never?

A: I'm not saying never. I don't know what—*I don't recall it was a big concern.*

Deft's App. at 33 (emphasis added). Halverson-Collins also asserts that while she knew that the department head of the Prevention Department, Pam Bygness, had complained to Hostetler about her failure to provide Bygness with financial figures—that the complaints were unfounded, and that in all likelihood Bygness either chose not to review the information or could not comprehend the information reported in the financial reports. Plf.'s App. at 83. Halverson-Collins further avers that she "never had any complaints from the CFR Board [of Directors] with respect to any work I was doing." *Id.* In fact, none of the meeting minutes contained in the record of the Board of Directors, Executive Committee or Financial Committee indicate any direct discussion, negative or positive, of Halverson-Collins's job performance. *See* Deft's App. at 61; Plf.'s App. at 42-56; 64-69; Deft's Supp. App. at 32. Finally, Halverson-Collins stated: "At no time has Mr. Hostetler

told me that I was unable to perform the functions of my job properly.” Plf.’s App. at 84. Irregular performance evaluations of Halverson-Collins were performed by Hostetler from 1996 through 2003—however, these evaluations, especially those for 02/2001 through 08/2003, are unreliable indicators of Halverson-Collins’s job performance and skill set for at least a couple of reasons: (1) they were not timely completed; (2) they were not given to Halverson-Collins until *at least* August 29, 2003 (and according to Halverson-Collins, not until October/November 2003); and (3) Hostetler admitted that as of August 29, 2003, he “still [could] not evaluate [Halverson-Collins’s] performance.” Plf.’s App. at 61. Therefore, Halverson-Collins’s qualification for the “Accounting Technician” position boils down to choosing the employer’s testimony or the plaintiff’s testimony. This is what genuine issues of material fact are made of. At the summary judgment stage, the court must view the facts in the light most favorable to the plaintiff. *See Rothmeier*, 85 F.3d at 1336-37. Therefore, viewing the facts in the light most favorable to Halverson-Collins, the court finds that Halverson-Collins was objectively qualified, and possessed the requisite skill set, for the “Accounting Technician” position. Further, advertising a new position in the financial department only days after Halverson-Collins’s termination certainly raises questions as to the legitimacy of CFR’s contention that the financial department was restructured and reorganized, in part, due to a financial downturn—it is counterintuitive that a company experiencing a financial crisis would create new positions and take on new employees.

The court finds that the temporal proximity of the FMLA leave and the adverse employment action, in conjunction with the unexplained knowledge of Hostetler of the medical nature of Halverson-Collins’s November 2002 leave, and the job announcement for a position Halverson-Collins was objectively qualified for days after her termination, generates a genuine issue of material fact that the reasons articulated by CFR for

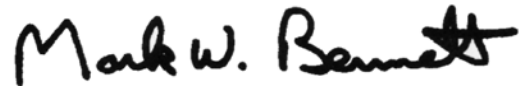
Halverson-Collins's termination are pretextual. As Halverson-Collins has met her burden in establishing a genuine issue of material fact as to pretext, summary judgment on her FMLA retaliation claim is inappropriate.

III. CONCLUSION

For the foregoing reasons, CFR's motion for summary judgment is **denied**.

IT IS SO ORDERED.

DATED this 6th day of April, 2005.

A handwritten signature in black ink that reads "Mark W. Bennett". The signature is written in a cursive, flowing style with a horizontal line extending from the end of the name.

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA